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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 723

L. E. (PRINCE) WALES, DOING BUSINESS AS WALES TRUCKING COMPANY, L. C. JONES TRUCKING COMPANY, INCORPORATED, PARKHILL TRUCK COMPANY AND H. J. JEFFRIES TRUCK LINE,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

STATEMENT SUPPLEMENTING JURISDICTIONAL STATEMENT IN VIEW OF MOTIONS TO AFFIRM

M. WARD BAILEY,
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We trust that this supplemental statement is not out of order nor improper, although we find no rule authorizing it, neither do we find anything in the rules preventing it.

This being a direct appeal the motions to affirm relate exclusively to the substantiality of the questions presented.

When it takes the private litigants sixteen pages and the government an additional six pages to undertake a showing that the questions raised are not substantial it is a foregone conclusion that they are substantial.

In connection with the question of qualification of the Examiner under the Administrative Procedure Act the Trial Court makes the inept remark that:

> "The *Tucker case*, originally reported in 100 F. (5) 432, was reversed by the United States Supreme Court, 344 U. S. 33, and the Complainants would be estopped now to raise such question, even were there any grounds".

There might be a question of stare decisis had the question been raised before the Commission in the *Tucker* case as it was raised in the case at Bar and specifically overruled. And it might be stare decisis had the question of the Commission's general order, "Organization and Assignment of Work", hereinafter referred to been raised and considered, but neither was presented in the *Tucker* case.

The Government and the Interstate Commerce Commission admit in their joint motion to affirm that in the *Tucker* case "The precise issue was not specifically decided".

This first and very important question relates to the disqualification of the Examiner under the Administrative Procedure Act, there being no question of waiver, the question having been raised before the Commission (and by it specifically overruled) and at the proper time under both the per curiam opinion in *W. J. Dillner Transfer Company v. United States*, 100 Fed. Sup. 506, affirmed per curiam November 10, 1952, — U. S. —, 97 L. ed. (advance page 120) and more particularly under the Commission's general order "Organization and Assignment of Work" as amended (12 F. R. 3228, Paragraph 0.4a). In neither the *Tucker Truck Lines* case, 344 U. S. 33, nor in the *Dillner*

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case, *supra*, was the question of the appropriate time to raise the question of disqualification of the Examiner under the Administrative Procedure Act in light of the Commission's aforesaid General Order raised nor considered by the Court. Of course the question was not raised in either of those cases before the Commission. Here it was raised and specifically ruled on.

The facts are that the Interstate Commerce Commission is caught in its own trap by reason of its bold and brazen attempt on May 12, 1947 to avoid and evade the mandatory requirements of the Administrative Procedure Act by its entry of the aforesaid General Order "Organization and Assignment of Work" by adding Section 0.4a in which it made no effort to cover up its obvious intent but specifically referred to the Administrative Procedure Act and knowing full well that Examiners were required in procedures such as here involved provided in the General Order that "all proceedings of the character in which, by provisions of the Administrative Procedure Act (60 Statute 237), a hearing is required to be conducted in conformity with Section 7 and a decision to be made as provided in Section 8 of the Act, *shall be and are reserved to the Commission for initial decision.*"

In other words, the General Order provided as it could do under the provisions of the Administrative Procedure Act that the record, after the testimony was taken by an examiner, was considered certified to the full Commission, and the Commission would make the *initial* and only decision which the Interstate Commerce Commission would ever make in such proceedings. The proposed report of the Examiner in this case was not and under said order could not be the initial decision and under the General Order it made no difference what was presented to the Examiner other than for the Examiner to take the evidence. As soon as he had taken the evidence it was then before the Com-

mission for the Commission to make the initial and only decision. Any other step that was taken was just like the act of the Examiner as for instance the report and order of Division 5 and meant nothing whatsoever under the Commission's General Order referred to because the Commission had stripped all authority away from everyone except the full Commission to render the initial decision.

Whatever the examiner did in these proceedings and whatever Division 5 did in these proceedings were nothing more than suggestions to the Commission as to what the Commission should do when the Commission made the "initial decision" and the General Order makes this clear because the General Order provides that as an *aid* to the full Commission in the performance of its work under the reservations that "for such purpose of initial decisions" matters so reserved to the full Commission "may be assigned to a division, individual Commissioner or board as provided in Section 17 of the Interstate Commerce Act (49 U. S. C. 17), by the General Order of the Commission as to assignment of work, business or functions" and then the General Order goes on to provide that "for the purpose of *such initial decision* the record in the proceeding *so reserved* shall be considered as certified to the Commission *for initial decisions* when received by the Secretary of the Commission for filing in the docket".

There was not therefore in this proceeding even so much as an initial decision until the Commission acted on May 7, 1952. Under the Commission's reservations there had been some prior recommendation to the full Commission as to what its *initial decision* should be and that is all. The initial decision by the full Commission on May 7, 1952 made utterly no findings of fact, no conclusions of law and is wholly unintelligible and decides nothing except as reference may be made to a recommendation of Division 5 to the Commission back on June 11, 1951 which, under the Com-

mission's General Order, meant nothing whatsoever except a recommendation for any authority which Division 5 of the Commission might have had, had been stripped from it by the aforesaid General Order.

The Commission was simply undertaking to operate entirely outside of and beyond the pale of the Administrative Procedure Act. When the question of qualification of its Examiners was raised before the Commission *there had never even been an initial decision* in the case and it was raised in proper time. It seems to us that it is a certainty that that question was raised at the proper time or else possibly it may have to be said that there has in fact been no initial decision on the applications at all because the Commission's decision of May 7, 1952 is certainly the initial decision under the Commission's own General Order and the Commission's order of May 7, 1952 does nothing at all, it authorized nothing at all, it finds no facts, it contains no conclusions of law, it in fact makes no final determination of the applications.

The so-called petitions for reconsideration in which the question of qualification of the examiners was raised were not in any sense true petitions for reconsideration under the Commission's General Order because only the full Commission could consider the applications and make the initial decision. They were simply briefs filed with the full Commission for that Commission's first and the only consideration which the Commission had or has ever given to the applications in the performance of their function of making an initial decision. The use of the words "initial decision" certainly could have no meaning except first decision.

Moreover, it is obvious to us that the Court's decision in the *Tucker Truck Line case, supra* did not mean that the question had to be raised before the examiner. It merely means that it should be raised at some point in the pro-

ceeding before the Commission so that the Commission would have an opportunity to pass upon it. That is certainly the rationale of the decision in spite of the conflict in choice of language used. The question was raised before the *initial decision* by the Commission under its own General Order, if there has in fact been an initial decision, and that is all that is required.

Moreover, if the question had been raised before the Examiner the Examiner would not have passed on it under the Commission's Procedural Rule No. 70, nor under the Order assigning the applications to the Examiner. Neither was it important that it be raised there because the parties had a perfect right to raise the question under the Commission's Procedural Rule No. 101. Of course after the Commission stripped its Examiners and Divisions of all authority, by reserving the initial decision to the full Commission, it had the effect of completely disorganizing the Commission procedure under its Procedural Rules. If, however, it be otherwise then the parties had the perfect right to raise the question at any time before the full Commission acted under its Procedural Rule No. 102, which allows parties to raise practically any question which the parties deem relevant and important and require the Commission to pass upon them.

The question here presented has not been before the Court and the Government admits this. The question is substantial, highly important, and should be by the Court considered.

Commission Exceeded Statutory Authority

A second highly important and substantial question presented is whether or not administrative bodies must act within statutory authority basing their orders upon statutory criteria. We have always thought, and hundreds of

cases have asserted, that administrative bodies must follow carefully and specifically the requirements laid down by Congress to protect the public from administrative absolutism. It is not too much to insist that the statute be followed and such insistence is not a mere search for precision, but an insistence upon a substantial question of right.

To our insistence upon this the Trial Court naively remarked that "we do not understand that the words 'convenience' and 'necessity' are to be bound and limited by any authority save and except the Interstate Commerce Commission." This is administrative absolutism. Section 207, Interstate Commerce Act, Part II (49 U. S. C. A. 307) fixed criteria within which the Commission must act. The National Transportation Policy sets forth further guiding principles. In passage of the Motor Carrier Act of 1935 the criteria for the issuance of new certificates was adopted which had been employed since the Transportation Act of 1920. Such use indicated a continuation of the administrative and judicial interpretation of that language.

In many cases the Commission itself has interpreted this criteria. It has insisted that there must be an affirmative showing that the proposed service is not only required in the convenience of the public proposed to be served, but that it is a necessity on the part of such public; that this latter element includes a showing that the present facilities are inadequate for the transportation of the described commodities between the points involved. The Commission has stated the same criteria differently by insisting that before a new motor carrier service may be authorized that it must be shown that the new operation will serve a useful public purpose, responsive to a public demand or need, that this purpose cannot and will not be served as well by existing carriers and whether it can be served by an applicant in

the new operation proposed without endangering or impairing the operations of existing carriers. This is in keeping with the National Transportation Policy.

Pan American Bus Lines, Common Carrier application, 1 MCC 190; Zephia O'Dell Clark, Common Carrier, 1 MCC 445; George Edmund Jackson, Common Carrier, 7 MCC 656; West Coast Bus Lines, Ltd., Common Carrier, 32 MCC 619; Squaw Transit Company, Common Carrier, 48 MCC 17; Tri-State Transit Company of Louisiana, Inc., 29 MCC 381; Spencer, Extension, 29 MCC 73; Sullivan, Extension, 34 MCC 157; Chief Refrigerated Truck Lines, Inc., 34 MCC 492; Santa Fe T. Co., 41 MCC 731; McCoy Truck Lines, Inc., Extension, 26 MCC 585; McClenden Extension, 26 MCC 590; Inland Motor Freight, Extension, 27 MCC 784; Gulpker Extension, 29 MCC 723; Holland Transportation Co., Inc., 33 MCC 558; Thompson, Extension, 34 MCC 5; Contract Carriers, Inc., 41 MCC 165; Clark Callahan, Inc., 41 MCC 693; Maner, 42 MCC 778.

The Commission in this proceeding violated and completely abandoned the statutory criteria and its own interpretation thereof and set up the determining criteria as being whether or not there was such probability of an increase in oil field activities in the Rocky Mountain States as to justify the granting of authority for the institution of nineteen additional carrier services. Nineteen such additional services were authorized, as the Attorney General and the Interstate Commerce Commission frankly admit, upon the basis of a finding, not by the Commission in making the *initial decision*, but by Division 5 of said Commission in a recommendation to the Commission that there was "an immediate prospect" of a "large scale development program" for the Rocky Mountain Area, that such development would produce demands for transportation service "of the highly specialized nature here considered,"

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which would "greatly exceed" the capacities of existing carriers. This is a complete reversal of both Commission and judicial interpretation of the applicable standards. The Commission was not acting within the statutory criteria, but in violation thereof.

In such findings Division 5 was not exercising its experties as Division 5 frankly admitted saying that "we have no alternative but to rely upon the judgment of persons who are in a position to give the best estimate of the future probabilities". The statement had reference to what Division 5 admitted was highly speculative. As to the probabilities of large scale oil development the Commission of course has no experties in the oil business.

The Commission directly violated Section 210a(a) wherein Congress in furtherance of the National Transportation Policy has provided for such contingencies as an oil boom, by providing for the issuance of temporary certificates for periods of one hundred eighty (180) days, within which permanent authority applications could be determined. The very purpose of Section 210a(a) was to perpetuate administrative and judicial interpretation of the criteria set forth in Section 207, and effectuate the National Transportation Policy. All of this the Commission in this case completely ignored.

Again we assert that it is not too much to insist that the Commission act within statutory criteria rather than degenerate into administrative absolutism.

The question presented is substantial and important. Whether controlling statutory standards have been properly applied are questions which Courts can and do determine. *Florida* v. *United States*, 282 U. S. 194; *Interstate Commerce Commission* v. *N. P. R. Co.*, 216 U. S. 538; *United States* v. *Carolina Freight Carrier Corporation*, 315 U. S. 475; *Eastern Central Motor Carrier Association* v. *United*

States, 321 U. S. 194; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60.

Basic Findings

A third highly important and substantial question involved herein is the refusal of the Court to vacate the orders of the Commission for failure to make basic findings of fact to support its ultimate conclusion.

The Commission's ultimate conclusion was couched only in the language of the statute.

Of course the Commission by its General Order "Organization and Assignment of Work" (12 F. R. 3228) made no findings of fact at all, neither did it arrive at any conclusions at all. See Commission's order of May 7, 1952. Division 5 of the Commission in a recommendation to the Commission in aid of the Commission's issuing the initial order did, as the Attorney General and the Interstate Commerce Commission frankly state, find that there was an immediate prospect of a large scale development program in the oil industry for the Rocky Mountain Area and that such development would produce demands for transportation which would greatly exceed the capacities of existing carriers. It must be remembered, however, that Division 5 had been stripped of all authority to make any kind of an order in these cases, that authority having been specifically reserved to the Commission. Even should the findings be imputed to the Commission and under the General Order referred to the word "imputed" is advisedly used, still the findings are not sufficient.

The Commission and the Court have many times construed and defined the criteria in which the Commission must act in granting certificates of convenience and necessity. That criteria has been shown in connection with the second important question hereinabove discussed. Remem-

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bering that the Commission under its reservation to make the initial decision has made no findings or conclusions, but by imputing the finding of Division 5 to the Commission itself then we point out that the orders under attack utterly fail to make any finding (1) of any inadequacies or deficiencies in existing service; (2) of inefficient or uneconomical operation by existing carriers; (3) of any public demand or need for the proposed service; (4) even if there was any demand whether or not such demand could or would be served as well by existing carriers and (5) even if there was any demand whether it could be served by nineteen (19) additional carriers without endangering or impairing the operations of existing carriers contrary to the public interest and the National Transportation Policy.

Some such findings or their equivalent are essential to support the ultimate conclusion in the language of the statute that present and future public convenience and necessity require the nineteen (19) proposed carrier services. Otherwise the Commission has acted beyond its statutory authority and the order becomes administrative absolutism. Congress has prescribed the statutory standards pursuant to which the applications were to be determined. Congress has also provided for judicial review as an assurance that its policies will be executed. An insistence upon the findings which Congress has made basic and essential to Commission action is no intrusion upon the administrative process. It is nothing more than an insistence upon the observance of those standards which Congress has made prerequisite to the operation of its statutory commands.

As already pointed out the Commission has not applied that criteria. It has made no basic findings within the established criteria from which its ultimate statutory conclusion could be reached. There being no such basic findings the statutory conclusion is entirely insufficient just as found in *Florida* v. *United States*, 282 U. S. 194. See also

United States v. *Carolina Freight Carrier Corporation*, 315 U. S. 475 and many other cases unnecessary to cite.

When the Commission by General Order such as herein pointed to reserves exclusively to itself the function of making the initial decision, stripping its Examiners and Divisions of all such authority and then abandons its statutory duties and makes no order or decision and makes no findings and enters no conclusions but relies upon findings which it undertakes to impute to itself, which findings are within themselves wholly insufficient and lacking in basic essentials to support a conclusion, the question becomes very important and very substantial. If such action of the Commission is not condemned by the Courts, statutory rights will be whittled away and statutory criteria and the National Transportation Policy destroyed.

Consolidation of Proceedings; Consolidation of Separate Records; and Co-Mingling of Evidence

Two additionally important and substantial questions are here presented, first, with reference to the consolidation of twelve (12) and the subsequent consolidation of six (6) applications for hearing on separate records. The Commission itself did not consolidate these numerous applications for hearing. That matter was left to the Examiner. The Examiner on motion when the applications were called for hearing consolidated twelve applications and subsequently consolidated six applications, but in so doing specified that each witness would be required to state which applicant the witness supported.

This was the first highly prejudicial error committed in connection with these many applications and it was over the strenuous protest of the complainants here along with many other carriers opposing the applications.

The applications were not closely related, but on the contrary presented substantially different issues among the

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original twelve applicants heard on one record and the same may be said as to the six heard on another record. It is pointed out that some of the applicants sought to serve in a territory stretching from Florida and Georgia through the length of those southeastern states on through the southwestern states and into the Rocky Mountain States, while others sought only authority from some of the southwestern states to the Rocky Mountain States. The applications ranged over a territory of from 2,000 miles in length and covering many states of the Union, to some 1,000 miles in length covering some but much lesser number of states. At least three of the applicants already had authority to serve in at least four of the so-called Rocky Mountain States. It is obvious that the applications were not and could not be closely related there being such a wide divergence of territory sought, nor could the issues be in any respect the same because the issues were controlled by the territory sought and the varying conditions in the varying territory.

All opposing parties, including the complainants, strenuously objected to this prejudicial action of the Examiner which was subsequently greatly aggravated by the action of Division 5 of the Commission, which action is necessarily imputed to the full Commission, in consolidating all of the applications and considering all of the records and evidence as though a single hearing had been had and a single record made on all applications, and the co-mingling of the evidence in the separate records as though all evidence had been presented in a single record.

In this connection the Trial Court merely said that the practice of consolidating had been approved in *Central Transfer Company* v. *Terminal R. R. Co.*, 288 U. S. 469, *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683; *Greyhound Corporation, et al*, 57 MCC 123; *Meeker* v. *Lehigh Valley*, 236 U. S. 434 and *Akron C & Y R Co.* v.

United States, 22 Fed (2) 199. The cases cited in no respect support the statement.

The Trial Court then said that consolidation eliminates costly duplication in the presentation of evidence and affords opportunity for more expeditious disposition of proceedings. This statement while true is in utter disregard of the sound judicial practice of consolidating cases for trial only where the cases are very closely related with substantially similar issues and where prejudice will not occur to the litigants. The action of consolidation in this case was strictly at the expense of opposing parties including these complainants. It resulted in very great prejudice. For the latter statement of the Trial Court it cites *T. E. Mercer, et al—Oil Field Commodities*, 46 MCC 845. The *Mercer* case is authority with nothing in connection with this contention. In the *Mercer* case there were a large number of applications heard on a consolidated record, but the cases were substantially identical and the issues identical in that nothing was involved in those applications except the formulation of an adequate commodity description. All parties were equally interested in obtaining a commodity description which would permit them to transport such commodities as were necessary to render an all-around and complete service to the oil industry.

In the *Pierce Auto Freight Lines* case, 327 U. S. 515 your Honorable Court only said that there was no objection if the Commission chose to determine the two applications in a single opinion rather than in separate opinions "because they were so closely related in their common features". Their common feature was that each applicant there sought to institute a through service between Portland, Oregon and San Francisco, California, a situation very different from that presented in the case at Bar. In that case your Honorable Court approved that action of the Commission in

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writing one opinion rather than two only "if the single report together with the findings and the evidence was sufficient to sustain *the action taken in each case.*" Your Honorable Court then went on to say that:

> "The principal cause of complaint in these respects is that the Commission did not consider each case exclusively on its own record, but looked into the evidence in both proceedings in forming its judgment. If this is true and if it has resulted in substantial prejudice to the appellees, as might occur, for example, if the Commission were shown prejudicially to have considered evidence bearing on one case which did not affect it and was presented in the other, and the appellees were given no opportunity to meet, the orders, or one of them, would be improperly grounded."

It was highly prejudicial to consider all of the evidence of all witnesses on all of the applications as bearing upon and supporting all of the applications, eighteen or nineteen in number, when none of the witnesses in the proceeding involving the group of six testified in connection with the applications involving the group of twelve. The witnesses involving the group of twelve did not testify on behalf of the applicants in the group of six. Quite a few of the witnesses who testified in connection with the group of twelve, and also the group of six, only supported one of the applicants and some of the witnesses were under the impression that they had to support all of the applications or none and certainly none of the witnesses knew when they supported one or more of the applications that they were supporting eighteen or nineteen applicants for that many new carrier services. Nothing but prejudice could possibly result. Especially when Division 5 treats all of the witnesses as supporting all of the applications.

In such circumstances, and under the Examiner's requirements that each witness would be required to state what

applications the witness supported, your complainants although cross-examining all witnesses in all of the proceedings certainly had no idea, nor could they have had, that the testimony of a witness for the twelve group would be treated as though he was also testifying on behalf of six or seven other carriers, nor that when a witness testified for one or more in the group of six that he was testifying on behalf of twelve other carriers. Having no such thought as that complainants were denied the right of cross-examination with any idea in mind that a witness was supporting eighteen or nineteen applications. Of course it is ridiculous to say that a witness would support eighteen or nineteen applications for that many new carrier services and ever at any time undertake to say that he had a need, present or future, for that many new carriers.

Also bear in mind that the *Pierce Auto Freight Lines* case, which comes nearer to touching the issue here involved than any other decision of your Court, was decided prior to the enactment of the Administrative Procedure Act. When the Commission proceeded in the manner in which it proceeded in this case it directly violated the provisions of Section 7(d) (5 U. S. C. A. 1006 (d)) which requires that the transcript of testimony and exhibits filed in a proceeding "shall constitute the exclusive record for decision". But, as shown, the Interstate Commerce Commission has shown an utter disregard of the Administrative Procedure Act and its requirements and has brazenly undertaken to take itself outside of the provisions of that Act.

Division 5 in a so-called report, imputed to the Commission, says that thirty-seven (37) shippers supported the applications, referring to eighteen of them. This is definitely untrue. In the so-called report, however, the Commission treated each and every witness as though he was supporting each and every application irrespective of the

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record in which his testimony appeared and irrespective of whether the witness said that he was supporting merely one or more of the applications, or whether he said he was under the impression he had to support all or none. It should be obvious that no witness was supporting eighteen or nineteen applications.

Under the specific commands of the Administrative Procedure Act, but disregarded and at least so far as the Interstate Commerce Commission is concerned emasculated, and the direct inferences of your Honorable Court in the *Pierce Auto Freight Lines* case, Section 1,009(e) Congress has said that "the reviewing Court . . . shall . . . hold unlawful and set aside agency findings and conclusions found to be . . . (3) in excess of statutory jurisdiction, authority or limitations, or of short of statutory right; (4) without observance of procedure required by law; . . .".

Complainants and all other parties opposing these many applications were highly prejudiced, as definitely shown, by the co-mingling of evidence in separate records. In doing this the Commission specifically acted (1) in excess of statutory authority; (2) in excess of statutory rights and (3) without observance of procedure required by law. That is a very substantial and highly important question in this proceeding.

The Government and the Interstate Commerce Commission in their motion to affirm omit to say anything about the question of the co-mingling of the evidence and as to the prejudicial consolidation they say that that procedure is well settled, citing *Civil Aeronautics Board* v. *State Airlines*, 338 U. S. 572; *American Trucking Association* v. *United States*, 326 U. S. 77 and the *Pierce Auto Freight Lines* case. It is sufficient to say that the first two cases cited do not support their statement in any respect. That question was not raised in the first cited case and although raised in the *American Trucking Association* case it was

exactly in the reverse of this case and actually only one carrier was involved on applications covering a variety of routes. As we see it, the *Pierce Auto Freight Lines* case actually determines nothing except in relation to the fact that it was all right that the Commission chose to write one report rather than two. The respondents cannot find any comfort in that case. We are not complaining about the mere writing of one report, but we are very bitterly complaining about the prejudicial consolidation of so many applications for hearing and the unlawful and unreasonable co-mingling of the evidence from separate records when complainants and their counsel had no idea during the course of the various proceedings that the Commission would treat the testimony of all witnesses as though it had been given in connection with all applications and in all of the proceedings. Consequently we did not cross-examine with such circumstances in view.

Orders Are Not Supported by Substantial Evidence

EXHIBIT NUMBERED AS 50 IN INTERSTATE COMMERCE COMMISSION RECORD ALTHOUGH WHOLLY INADMISSIBLE, CONSTITUTES ONLY BASIS FOR ORDERS.

That administrative orders must be supported by substantial evidence is basic. The Trial Court, however, proceeded upon the theory that the Interstate Commerce Commission "is the final arbiter upon whether or not additional motor carrier services are required". This is not so to the extent that the law and the Courts require that Commission decisions must be based upon substantial evidence.

What constitutes substantial evidence where, in a case like this, the Commission is considering nineteen (19) applications on what is one record, at least the way the Commission considered them. Remembering the burden of proof as fixed by the Commission for any one applicant should the formula or burden of proof here be: Burden of

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proof multiplied by 19? If so what we have is burden of proof multiplied (but magnified by speculation) nineteen times. The result is that the determination has no basis in evidence and is devoid of reason.

To the contrary of the Trial Court's statement the Supreme Court in the *Universal Camera Corporation* case, 340 U. S. 474 said that since the adoption of the Administrative Procedure Act that "Congress has left no room for doubt as to the kind of scrutiny the Court of Appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof". The opinion makes it clear that it is the duty of Courts and that Congress has imposed upon Courts the responsibility for assuring that the Board keeps within "reasonable bounds". The Court must examine the record and determine for itself the question of substantiality.

This the Trial Court did not do for it was obsessed with the idea of administrative finality and absolutism as quotations from the Court's opinion show. We assert that when all of the evidence is examined, excluding the inadmissible Exhibit Number 50 of the Interstate Commerce Commission record that there is not only no substantial evidence, but there is no evidence which supports the Commission's findings. No witness testified to the inadequacy of existing service. Most of them admitted the adequacy of existing service. Practically none of the witnesses knew what service was presently available and none of the witnesses knew what equipment was available among the various existing carriers for the transportation of their commodities. Most of the witnesses did not even know that three of the applicants (defendants herein) already had authority to transport their commodities to four of the Rocky Mountain States. Of these three applicants who already had the authority, and had held the same for months prior to the hearings, had never transported a single shipment to any

of those states. None of the witnesses had any present need for any additional service. Practically none of the witnesses had any shipments at all moving to any of the western states. A great many of the witnesses said that there was no reason why the present carriers could not transport their shipments. Those shippers who had any shipments to move or who had had shipments in the past said that service of existing carriers was satisfactory. Most of the witnesses did not know of several existing carriers, including three of the applicants, who had authority to transport their shipments and when their attention was called to these various carriers said that there was no reason why they could not use them.

That is a very general statement, but it contains the facts from which it follows that the orders under attack are not supported by substantial evidence.

The Commission does not undertake to base any findings upon the testimony of shipper witnesses, but the order in context shows primarily and definitely that the orders were based upon what appears in the Commission's record as Exhibit Number 50. The Commission even admits that Exhibit No. 50 is highly speculative, leaving much to be desired. The Government and counsel for the Commission admit that the orders are in fact based entirely upon inadmissible Exhibit Number 50 as referred to. Because they state that Division 5 of the Commission (of course Division 5 had been stripped of all authority) held "that there was 'an immediate prospect' a 'large scale development program' for the Rocky Mountain Area, that such development would produce demands for transportation service 'of the highly specialized nature here considered' which would 'greatly exceed' the capacities of existing facilities, and that accordingly the 'present and future public convenience and necessity' require the proposed increased operations".

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In connection with our contention that the orders are without substantial support in the evidence we demand to know what witness who was sworn, took the stand and testified said that there was an immediate prospect of a large scale oil development program in the Rocky Mountain Area. We assert that no such witness appeared; that no such witness so testified. We also assert that no witness who was sworn and took the stand subject to cross-examination testified that even if there was what we commonly call an oil boom in the Rocky Mountain States that the need for transportation would "greatly exceed" the capacities of existing facilities. The record supports the contention.

No witness who was sworn and took the stand subject to cross-examination undertook to say that he was familiar with existing carriers and that was because those witnesses had had no need for any service and had not even tried to find out or in any way acquaint themselves with existing carriers. Those witnesses not only did not know the existing carriers, but they had no idea at all as to what facilities the existing carriers had and, therefore, of course knew nothing of the capacities of existing carriers to transport their shipments. There is nothing of that kind in the record by a live witness.

Now inasmuch as the Commission based its orders upon the findings as indicated, that is an immediate prospect of a large scale oil development program, it is only fair to determine where the Commission got that idea from the record. We assert that there is no place in the record from which the Commission could have gotten the idea and there is no support in the record for those findings by the Commission except Exhibit Number 50 as referred to.

If there was other support in the record for the Commission's findings we would say nothing about the erroneous admission of Exhibit Number 50 because it might be said

that the Commission gave little or no weight to Exhibit Number 50. The Commission's orders show quite the contrary, however, and that all weight was given to Exhibit Number 50. Exhibit Number 50 was erroneously admitted by the Examiner. It consisted of a lot of magazine articles and editorial comments by a large number of persons, known and unknown. No explanation was made, or even attempted, to explain the absence of the witnesses themselves so that they could actually take the witness stand to testify under oath and be subject to cross-examination. The Defendants who offered the exhibit in evidence did not undertake to in any respect qualify this magazine known as The Oil and Gas Journal for admission under any standard which the Courts have fixed for the admission of an instrument such as it was. Your complainants were thereby completely denied the right of cross-examination. This is a very valuable right inherent in Anglo Saxon Law. Since the orders under attack show in context that they were based on findings which came entirely and alone from that magazine its admission is error of such grievous character and so contravenes all existing law that the orders must be set aside.

When Division 5 made the findings referred to it said that it was relying upon the opinions of persons in positions to know. Division 5 was, therefore, first not exercising its experties and of course the Commission has no experties in the petroleum industry. Second, it was relying upon the magazine articles whose authors, known and unknown, were not called to testify and were not subject to cross-examination. As already stated, no live witness testified to anything of the kind. No live witness, that is one who was sworn, took the stand and was examined and cross-examined, could have testified to those things because of those witnesses practically all were ordinary transporta-

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tion traffic men, even those who testified on behalf of the oil companies. Not one of them could have qualified to testify about "extensive deposits of petroleum". Not one of them could qualify to testify about a thing in the world as to large scale development programs except to make the limited statement about what leases his company held and that is all that they would testify to. Each and every live witness qualified all of his statements by saying that any need for transportation would depend upon future developments and future developments were unknown. Many of the witnesses did not even hesitate to say that they were simply speculating. The Commission or at least Division 5 admits that all of the evidence is "highly speculative".

Nevertheless the Commission on this admittedly highly speculative evidence, and which so far as Division 5 findings are concerned came exclusively from magazine articles, authorized the grant of nineteen certificates. Had Exhibit No. 50 been excluded there would have been nothing in the record to support the findings of Division 5. Exhibit Number 50 should have been excluded and the Examiner committed highly prejudicial error in its admission. Although only admitted in connection with the record on the hearing of the group of twelve, nevertheless it was given full weight and consideration in connection with the group of six as well as in connection with the Newsom application. Section 10(e) Administrative Procedure Act, 5 U. S. C. A. 1009(e). *Interstate Commerce Commission* v. *L & N R R Co.*, 227 U. S. 88; *Consolidated Edson Company*, v. *N L R B*, 305 U. S. 197; *Southern Stevedoring Company* v. *Voris*, 190 Fed (2) 275.

Even if the authors, known and unknown, of those magazine articles had testified on the stand exactly in accordance with their writings complainants herein were still entitled on cross-examination to develop any additional or explana-

tory facts and to test the knowledge and competence of the witnesses as well as the basis of their opinions.

The Commission knew the rule but for some unknown reason and in their anxiety to grant these nineteen applications chose to ignore it. *Summerset Bus Company—Extension*, 43 MCC 543 (547); *Public Service Interstate Transportation Company—Bergen Turnpike* 43 MCC 599; Rocky *Mountain Lines, Inc.—Extension of Operations*, 27 MCC 57, *Calgary—Spokane Express, Common Carrier*, 29 MCC 746.

These magazine articles do not come under the rule permitting the use of market reports contained in newspapers or trade journals. Even market reports in trade journals are admissible only on the theory they are based on an authenticated source. *Virginia* v. *West Virginia*, 238 U. S. 202. It is perfectly clear that in no event would all those articles from this magazine have become admissible without the preliminary showing of authenticity. *Whalen* v. *Lynch*, 60 N Y 469; *Atlantic National Bank of Kerrach*, 242 Pac. 1009. The defendants who offered these magazine articles in evidence did not undertake to make the preliminary showing of authenticity.

The Government and Counsel for the Commission undertook to pass up these points with the mere statement that the Commission's report makes clear that little weight was given to Exhibit Number 50. Quite the contrary appears.

Stale Record

Another important question to be considered in this proceeding is the fact that the record in this case was stale. The facts are that these cases were heard in April and June of 1949. The report of Division 5, for whatever it was worth, was in 1951. The only order which the Commission made, under its reservation to make the initial decision,

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was on May 7, 1952, three years after the evidence was taken.

Your complainants insisted to the Interstate Commerce Commission before its order of May 7, 1952 that inasmuch as Division 5 in its writings on the applications had frankly admitted that the evidence was highly speculative, leaving much to be desired and inasmuch as Division 5 had predicated its suggestions to the Commission that all of the applications be granted upon its findings that an oil boom was impending, that after the passage of two or three years that the Commission ought to reopen the proceedings to determine whether or not any kind of an oil boom had developed. In other words, was there in fact "in immediate prospect" a "large scale development program" for the Rocky Mountain Area. After all Division 5 in its writings had, along with the authors of the magazine articles known and unknown, gazed into a crystal ball and made a mere forecast.

Would it not have been fair and reasonable after the passage of three years for the Commission to reopen the proceedings and determine whether or not the forecast as based on the admitted speculation had come true or was even about to come true. Surely two or three years would have determined whether the forecast was correct or incorrect.

Your complainant and other protestants insisted to the Commission that it should not act on the stale record and offered to produce evidence to show that there was no oil boom in the involved states. The Commission, however, in its anxiety about the situation, even though they had let three years elapse, refused to reopen the proceedings and find out what had happened in the three years to the prophesy which had been made. The Commission should have heard your complainants and other protestants and

intervenors evidence as to what had happened. That is the requirement of fairness as well as the holding of your Court in the *A. T. & S. F. R. Co.* case, 284 U. S. 241. Failure of the Commission to reopen was a clear abuse of discretion.

We know that the decision in the *A. T. S. F. R. Co.* case, *supra*, was promptly restricted to those special facts. *United States* v. *Northern P. R. Co.*, 288 U. S. 490. We assert, however, that the case at Bar presents such a clear abuse of discretion by the Commission as would sustain an exception to the limitation placed on the *A. T. & S. F. R. Co.* case and require that the Commission's order be set aside for failure to reopen. After all the cases merely hold that each case must be governed by its special facts. The special facts in this case require that the orders be set aside for failure of the Commission to reopen for further hearing.

Generally

The many questions presented are all important and substantial. We had little opportunity to present them to the Trial Court. On the record before us and in a case wholly unknown to the Trial Court we were allowed a fraction over one hour to present the case. The Trial Court remarked that "there are but two militant attacks." Untrue. We had no time to present our case and the Court was told that we would not have time in the allotted time but we were certainly not waiving any of the questions raised in the petition, whether we had time to present them or not. Just how little the Trial Court learned about the case is evidenced by the following statement:

> "Protestation was made at that time, charging that it was arbitrary, capricious, and prejudicial but *the Commission said*, 'It is the duty of the joint Boards and Examiners to develop such procedure in cases before the Commission as will complete the taking of

evidence with expedition and economy, without prejudice to the rights of the parties. The respective joint Board members were present at, and actively participated in the proceeding, and in the disposition of the applications assigned them. A very large portion of the evidence adduced equally to all of the applications. All parties were afforded the opportunity of a full direct or cross examination of the witnesses. There is no provision in the Interstate Commerce Commission Act which prohibits the hearing of related joint Board and Examiner cases upon a consolidated record. In the circumstances, it does not appear that any of the parties were, under the procedure adopted, deprived of any substantial rights in the proceedings.[1]' "

Frankly we cannot find anything in the records from which the quotation came and the Court does not tell us. In any event, the quotation is to the effect that joint board members were present and actively participated when there were never any joint board members present at these proceedings and none of the cases were joint board cases under the terms of the statute. It is said that the parties were afforded the opportunity of full direct or cross-examination of the witnesses. This is true only of the live witnesses who were sworn and took the stand, but even as to them complainants were denied the right of cross-examination so far as there was any thought at all that the evidence in all the records would be co-mingling and made applicable to all applicants. No one had any such thought or idea that that would be done. As to the many witnesses who testified in the inadmissible magazine articles, we were denied all right of cross-examination. In the circumstances it does clearly appear that complainants were irreparably injured and damaged under the procedure adopted, that in fact complainants were deprived of very substantial rights.

[1] We have just discovered that actually the Court is quoting from the *Mercer* case, 46 MCC 845.

Then the Court remarks that administrative bodies are not bound by strict rules of evidence which is true, but the Court goes on to say that the introduction of inadmissible evidence "will form no basis for reversal in the absence of the documents and comments of the Commission with respect to it . . ." It looks like the Trial Court thought that the inadmissible magazine articles were absent when in fact the document itself was in the Court room and in the record for the Court to consider as was also the comments of the Commission.

The questions presented are substantial, they are highly important and the Court should entertain jurisdiction and hear the appeal.

Respectfully submitted,

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